COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-08860

HILARY GOODRIDGE, JULIE GOODRIDGE, DAVID WILSON
ROBERT COMPTON, MICHAEL HORGAN, EDWARD BALMELLI,
MAUREEN BRODOFF, ELLEN WADE, GARY CHAMBERS,
RICHARD LINNELL, HEIDI NORTON, GINA SMITH,
GLORIA BAILEY and LINDA DAVIES,

Plaintiffs - Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH and HOWARD KOH,
COMMISSIONER OF THE DEPT. OF PUBLIC HEALTH,

Defendants - Appellees.

On Appeal from a Judgment
from the Superior Court, Suffolk County

BRIEF OF AMICI CURIAE OF THE STATES OF UTAH, NEBRASKA and SOUTH DAKOTA

DON STENBERG
Nebraska Attorney General
Department of Justice
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682 (phone)
(402) 471-3297 (fax)

MARK BARNETT
Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

MARK L. SHURTLEFF
Utah Attorney General
BRENT A. BURNETT
Assistant Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Attorneys for the State Amici Curiae

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INTEREST OF THE AMICI

The amici filing this brief are three sister states of Massachusetts and are co-sovereign members of the United States of America who perceive a substantial threat to the basic principles of cooperative federalism and reciprocal interstate relations if this court rules that the State of Massachusetts must legalize same-sex marriage. Because of interstate travel, and because of an apparent plan to nationalize the legalization of same-sex marriage by any state, by exporting same-sex marriages to other states, the effects of the decision of this court to legalize same-sex marriage would be felt almost immediately in other states. The legalization of same-sex marriage in Massachusetts by judicial order would produce confusion, conflict and divisive litigation in sister states for years to come.

STATEMENT OF THE QUESTION PRESENTED

Whether there are legitimate and rational reasons for Massachusetts to decline to issue marriage licenses to same-sex couples in light of the severe implications for interstate comity, and the consequences that legalization of same-sex marriage in Massachusetts would have to disrupt harmonious relations with other States and the Federal Government?

STATEMENT OF THE CASE

The Plaintiffs in this case are seven same sex couples who sought, and were denied, licenses to marry in Massachusetts. They filed suit in the Suffolk Superior Court asserting various statutory and constitutional claims, seeking to have the court judicially legalize same-sex marriage by ordering that they be

given marriage licenses. On May 7, 2002, Judge Thomas Connolly rejected those claims. *Goodridge v. Dep't of Pub. Health*, 14 Mass.L.Rptr. 591, 2002 WL 1299135 (Mass.Super. May 7, 2002).

SUMMARY OF THE ARGUMENT

The States submitting this amicus brief agree that Judge Connolly correctly concluded that Massachusetts is not required by constitutional, statutory or common law to legalize same-sex marriage or give marriage licenses to same-sex couples. While Judge Connolly's opinion very capably analyzed most issues, the extremely important interstate comity and federalism dimensions of the case below were not fully considered. Those interests provide further support for the judgment, furnishing additional compelling justifications for Massachusetts to decline to legalize same-sex marriage and to refuse to issue marriage licenses to same-sex couples.

It is now clear that advocates of same-sex marriage seek to have at least one State legalize same-sex marriage, and then to export same-sex marriages created in that state to other states, seeking thereby to force other states to recognize same-sex marriage over the well-established, strongly-supported marital policies and values of the people of those other states. In recent years, nearly two-thirds of all states have enacted legislation expressly forbidding same-sex marriage and/or explicitly denying interjurisdictional recognition to same-sex marriage. Additionally, by overwhelming margins the Congress of the United States passed and the President signed into law a federal enactment which rejects same-sex marriage for purposes of federal law. Massachusetts has a compelling

interest in not becoming the source of profound friction with other States and with the Federal government regarding the radical redefinition of marriage and exporting those controversies to the other American States.

ARGUMENT

I. Massachusetts Has a Profound Interest In Preventing the Manipulation of Massachusetts Public Policy to Force Other States to Legalize Same-Sex Marriage

This case is not only about how Massachusetts treats same-sex couples who want to marry, but it is also about how Massachusetts treats the other states. That latter question may ultimately have more far-reaching consequences than the former - consequences that could be extremely divisive and severely strain Massachusetts's relations with the other forty-nine states and with the people of those states. Avoidance of such consequences is one of the most compelling reasons why Massachusetts is justified in not legalizing same-sex marriage.

Any resolution of the same-sex marriage debate in Massachusetts must take into account what former U.S. Solicitor General Rex E. Lee called the "impact that Massachusetts's action will have on the 49 other states that constitute the United States of America." Rex E. Lee, *Same-sex Unions: Let Voters Decide*, Honolulu Advertiser, Mar. 3, 1996, at B3 (Rex E. Lee, Statement of Feb. 16, 1996). Commenting upon a then-pending case threatening to legalize same-sex marriage in Hawaii, Mr. Lee expressed concerns equally applicable to this case in the Supreme Judicial Court of Massachusetts:

> In many ways, including possibly through operation of the Full Faith and Credit clause, [one State's] legalization of same-sex marriage or similar laws could undermine if not supplant marriage laws of other states. At the very least, a same-

sex marriage policy would prompt a constitutional crisis as other states seek to avoid having domestic policy crafted in [Boston] imposed and enforced in Peoria. [Massachusetts] should be exceptionally hesitant before taking *any* action that could have such dramatic impact upon millions of essentially unrepresented citizens.

Id.

The people and the State of Massachusetts share those concerns. Massachusetts has a compelling state interest, as one of the United States of America, in not adopting a radical redefinition of marriage that would produce divisive, coercive pressures on the other states to recognize same-sex marriage.

A. Massachusetts Has a Compelling Comity Interest in Maintaining A Definition of Marriage That Is Consistent With the Concept of Marriage Accepted in All Other Forty-Nine States.

As a member of a "union" of states, Massachusetts has a direct interest in the smooth functioning of interstate recognition of marriages. The adoption by Massachusetts of a radical new definition of marriage would cause significant disruption to that interstate union.

Legalization of same-sex marriage would constitute a radical change in the definition and the very concept of marriage. No state currently allows same-sex marriage. There is no indication that a consensus of the people of any state supports the legalization of same-sex marriage. In every state, marriage has been deemed to consist of a heterosexual union - only. In our legal system and its sources marriage has always been considered a male-female union.

Massachusetts has long recognized the desire for uniformity, when possible, in interstate relations, particularly in family law. For example, in

Perkins v. Perkins, 113 N.E. 841 (Mass. 1916), the court noted that "it is highly desirable that as to a subject of such vital and far-reaching importance as the dissolution of the marriage relation, there should be uniformity of practice between the several states of the Union in the recognition of judgments of sister states." The issue here is of comity to avoid radical redefinition of a ubiquitous fundamental institution on a matter of vital importance that will have profound and widespread extraterritorial effect.

In other contexts this Court has considered the impact on its sister states–even when interpreting its own constitution. In rejecting a criminal defendant's plea for an extension of the right to counsel the court noted, "Such a departure from precedent may not only have unforeseen consequences … but it would be unwarranted by any precedent either in our own jurisprudence and traditions or in those of any of our sister States." *Com. v. Rainwater*, 681 N.E.2d 1218, 1228 (Mass. 1997). In cases where Massachusetts has gone beyond the United States Supreme Court and extended rights based on the State constitution it has "pointed to decisions in our sister States to show that ours is not an idiosyncratic or merely personal judgment." *Com. v. Gonsalves*, 711 N.E.2d 108, 118 (Mass. 1999)(Freid, J. dissenting joined by Lynch, J.). *See, e.g.*, *Commonwealth v. Stoute,* 665 N.E.2d 93 (1996) (declining to follow *California v. Hodari D.,* 499 U.S. 621 (1991)); *Commonwealth v. Upton,* 476 N.E.2d 548 (1985) (declining to follow *Illinois v. Gates,* 462 U.S. 213 (1983)). *See also McDuffy v. Sec'y of Exec. Off. of Educ*., 615 N.E.2d 516, 554 n.91 (Mass. 1993) ("Our conclusion that the Commonwealth is in violation of its constitutional duty

to educate our children is not the first decision of its kind. The highest courts of some of our sister States have declared their educational systems to violate the education clauses, the equal protection provisions, or both clauses, of their Constitutions."). The practice of looking to sister states to affirm the wisdom of judgments dates back some time. *See e.g., Stockwell v. Hunter*, 52 Mass. 448, 456 (Mass. 1846)("These views seem to be fully sustained by adjudications in courts of our sister States.").

Massachusetts has also refused to recognize new "fundamental rights" which are unrecognized in other states. For example, in *Doe v. Superintendent of Schs. of Worcester*, 653 N.E.2d 1088 (Mass. 1995), this Court refused to recognize a fundamental right to public education under either the Federal Constitution or the state constitution. The court noted that "with exception of one case, no other state had held that there is a fundamental right to public education. We join the courts of several other jurisdictions in holding that education is not a fundamental right." *Doe v. Superintendent of Schs. of Worcester***,** 653 N.E.2d 1088, 1096 n.4 (Mass. 1995) (upholding expulsion of student who violated school's weapons policy). In a related vein, this Court has declared that when considering a "matter of comity, courts undertake to recognize a state of friendliness and reciprocal desire to do justice existing between nations and between the several States of the Union. 'It is not the comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained.'" *Universal Adjustment Corp. v. Midland Bank, Ltd., of London*, 148

N.E. 152, 160 (Mass. 1933).

When dealing with a question of first impression it is also common for the court to look to the courts of sister States which have ruled on the matter – even when dealing with Massachusetts law. For example, the Massachusetts Supreme Court has noted, "We are not bound, of course, in our interpretation of Massachusetts law by decisions of the courts of our sister States interpreting their laws. We have said before, however, that we consider such decisions instructive." *Coggins v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1117 n.10 (Mass. 1986). *See also., Boswell v. Zephyr Lines, Inc.*, 606 N.E.2d 1336, 1340 (Mass. 1993) ("This issue is one of first impression in this Commonwealth, but the courts of some of our sister States have discussed this question under attorney's lien statutes presenting the same language as ours. We now turn to an examination of these decisions."). This consideration extends back some time. *See e.g., Holmes v. Hall*, 45 Mass. 419 (Mass. 1842) ("This question has been fully considered by the courts of our sister States in three cases, and the result to which they came is entirely satisfactory to us."). *But see*, *New England Division of Am. Cancer Soc'y v. Comm'r of Admin.*, 769 N.E.2d 1248, 1252 (Mass. 2002)("We do not consider out of state authority particularly helpful in construing our statutes or in dealing with the Massachusetts Constitution.").

If Massachusetts were to legalize same-sex marriage, it would create a major deviation from and substantial discrepancy with the concept and definition of marriage accepted in all forty-nine of the other states. The disruption, conflicts and disharmonies that would arise between Massachusetts and the other states in

the union are potentially devastating. Marriage and marital status play a role in literally hundreds of government laws and programs in each separate jurisdiction -- both state and federal. As a Commission sympathetic of same-sex marriage even acknowledged: "When the State defines a spouse it has the effect of pushing the first domino in a parade of dominos."[1]

With respect to each of those programs in each of the sisters states and the federal government, the question of recognition of Massachusetts' same-sex marriages would be raised, litigated, analyzed and decided. Conflict and inconsistencies would be expected, not only from state to state but within any given state (a state might recognize same-sex marriage for one law or program, but not for another). Results could differ not only from law to law, program to program, and state to state, but depending on whether recognition was sought based on the marriage itself (license or certificate) or upon a judgment finding some marriage or marital incident, as well as upon who the parties were, their pre- and post-marital residences or domiciles, etc.

Traditionally, states have declined to recognize marriages valid in other states if they violate a strong public policy of the forum state. Uniform Marriage and Divorce Act § 210, 9A U.L.A. 176 (1987); Restatement, Conflict of Laws §21 (1934); *In re May's Estate*, 114 N.W.2d 4 (N.Y. 1953); *see further* Restatement (Second) Conflict of Laws § 283 (1972); *id.* at Reporter's Note, comments j-k. Cases in which marriages, valid in the state where performed, have

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[1] Report of the Commission on Sexual Orientation and the Law in Hawaii (Dec. 8, 1995) at 6.

been denied recognition by another state because they are incompatible with a strong public policy of that state are legion. Many recent cases reaffirm this principle. As the Virginia Court of Appeals recently noted, "no state is bound by comity to give effect in its courts to the marriage laws of another state, repugnant to its own laws and policy."[2] Teenage marriages, common law marriages, uncle-niece marriages, and first-cousin marriages which were valid where performed, have been denied recognition as violative of the public policy of some other state. If such deviations from "conventional" marriage are deemed to violate strong public policy, then given the long history of prohibition of homosexual unions and rejection of attempts to legalize same-sex marriage, it must be expected that same-sex marriages would normally be denied recognition as well.

The interstate marriage recognition complication would be compounded since the general common law rule is that a marriage that is void *ab initio* needs no judicial annulment--the parties can just act as if the marriage had never occurred.[3] The possibility for confusion as parties move from state to state, where

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[2]*Hager v. Hager*, 3 Va. App. 415, 349 S.E.2d 908, 909 (1986), *citing Toler v. Oakwood Smokeless Coal Corp.*, 173 Va. 425, 430, 4 S.E.2d 364, 366 (1939)); *State v. Austin*, 234 S.E.2d 657, 663 (W. Va. 1977) (under the common law "a State is not required to recognize a marriage performed in another State which is repugnant to the former State's statutes or public policy").

[3]*See e.g.*, *Kleinfield v. Veruki*, 372 S.E.2d 407, 409 (Va. Ct. App. 1988) ("A void marriage, unlike a voidable marriage, does not require an action of annulment to render it void. Without obtaining an annulment, a party to a void marriage is free to marry again.").

a same-sex marriage is valid in one, voidable in another, and void *ab initio* in a third is too great to ignore.

The potential for conflict, inconsistency, confusion, and injustice if Massachusetts legalizes same-sex marriage is enormous. The smooth functioning of interstate relations regarding marriage and family relations is one of the most compelling state interests shared by Massachusetts and the other forty-nine states. As Justice Jackson expressed it: "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom." *Estin v. Estin,* 334 U.S. 541, 553 (1948) (Jackson, J., dissenting). Yet that primary interest of government will be jeopardized if Massachusetts legalizes same-sex marriage. It is contrary to Massachusetts's compelling state interest in harmonious relations with the other states and consistent concepts of family law to adopt a radical redefinition of marriage that would put such stresses and strains on marriage recognition in the interstate union.

B. Massachusetts Has a Compelling Comity Interest in Rejecting A Radical Redefinition of Marriage That Would Be Used to Force Acceptance of Same-Sex Marriage on the People in the Forty-Nine Other States.

Massachusetts has an interest in not having its marriage law manipulated by special interest groups into furthering a scheme to force acceptance of a radical

redefinition of marriage upon the other states. It is in the public interest to prevent and avoid whenever possible the use of public resources and law to promote the private interests of special groups. It is contrary to Massachusetts' interest to be a party to a coercive scheme to force same-sex marriage upon the United States.

It is a very serious matter to propose to force unwilling states to recognize same-sex marriages. Yet that is precisely the tactic pursued by advocates of same-sex marriage. Advocates of same-sex marriage have openly declared their intention to force other states to recognize same-sex marriage if Massachusetts legalizes same-sex marriage. For example, Evan Wolfson, has written that "full faith and credit recognition [of same-sex marriages] is mandated by the plain meaning of the Full Faith and Credit Clause, and by basic federalist imperatives,"[4] and argued that "if you're married, you're married; this is one country, and you don't get a marriage visa when you cross a state border."[5] Deborah M. Henson argues that Article IV, § 1 of the Constitution should and can be interpreted to compel other states to recognize same-sex marriage if Massachusetts or some other state legalizes same-sex marriage.[6] Many other legal scholars writers in

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[4] Evan Wolfson, Director of the Marriage Project (Lambda Legal Defense and Education Fund, Inc., *Winning and Keeping Equal Marriage Rights: What Will Follow Victory in Baehr v. Lewin? A Summary of Legal Issues* at 4 (March 20, 1996).

[5] *Id.* at 2 (April 19, 1996).

[6] Deborah M. Henson, *Will Same Sex Marriages be Recognized in Sister States?: Full Faith and Credit and Due Process Limitation on States' Choice of Law*

law review and other publications have made similar arguments calling for "invigorating" the Full Faith and Credit Clause to require states to recognize same-sex marriages,[7] asserting compulsory recognition and enforcement in all states of "marital decrees" recognizing same-sex marriages,[8] or asserting that "[i]f Massachusetts legalizes same-sex marriages, the effects will be felt across the country since other states must recognize gay marriages performed in Massachusetts under the Full Faith and Credit Clause of the U.S. Constitution."[9]

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regarding the Status and Incidents of Homosexual Marriage Following Massachusetts's Baehr v. Levin, 32 U. LOUISVILLE J. FAM. L. 551, 584-590 (1993-1994) (hereinafter "Henson").

[7]Nancy Klingeman & Kenneth May, *For Better of For Worse, In Sickness and in Health, Until Death do Us Part: A Look at Same-Sex marriage in Massachusetts*, 16 U. HAW. L. REV. 447.

[8]Habib A. Balian, Note, *Til Death Do Us Part: Granting Full Faith & Credit to Marital Status,* 68 S. CAL. L. REV. 397, 401, 406-408 (1995).

[9]Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 Tex. L. Rev. 921 (1998); Anne M. Burton, Note, *Gay Marriage -- A Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil & Political Rights,* 3 IND. J. GLOBAL LEGAL STUD. 177, 195 (1995); *but see id.* n.22. *See further* Evan Wolfson, *Crossing the Threshhold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Debate*, 21 N.Y.U. Rev. L. & Soc. Change 567, 612 n. 196 (1994-95) (referring to another forthcoming article arguing that Full Faith and Credit mandates interstate recognition of same-sex marriage). Barbara J. Cox , *Same Sex Marriage and Choice of Law: If We Marry in Hawaii are We Still Married When We Return Home?,* 1994 WIS. L. REV. 1033, 1041 n. 23 (1994); Mark Strasser, The Challenge of Same-Sex Marriage, Federalist Principles, and Constitutional Protections (1999).

Schemes suggesting judicial declarations of marital status to increase the prospects for interstate recognition have been promoted. Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 Ky. L.J. 1075, 1077 (2000); *see generally* Arthur S. Leonard, *Ten Propositions About Legal Recognition of Same-Sex Partners*, 70 Cap. U. L. Rev. 343, 350-355 (2002).

The plaintiffs seek to radicalize Massachusetts' marriage law for the purpose of using it as a wedge to force other states over their objections to recognize same-sex marriage. Preventing such a manipulation of Massachusetts' marriage law constitutes a compelling state interest.

C. The Experience of Vermont Civil Unions Clearly Indicates That if Massachusetts Legalizes Same-Sex Marriage, It Will Be Aggressively Exported and Used to Try to Force Other States to Recognize Same-Sex Marriage.

The tremendously troubling interstate effect of legalized same-sex marriage is clearly indicated by the experience of Vermont which under judicial constraint legalized marriage-like same-sex civil unions. During the first year after the same-sex civil unions law took effect, only 22% of the couples registering civil unions in Vermont were from Vermont; 78% were from other states. Report of the Vermont Civil Union Review Commission (Office of Legislative Council, January, 2001) <http://www.leg.state.vt.us/baker/cureport.htm>. More recent data (for 2002) indicates that now only about 11% of couples registering civil unions in Vermont are from Vermont; 89% are from other states. *Id.* (Office of Legislative Council,

January 20002)
<http://www.leg.state.vt.us/baker/Final%20CURC%20'Report%20for%202002.htm#V>. Likewise, were Massachusetts to legalize same-sex marriage, it can be expected that about 90% of all persons who would enter into same-sex marriages would be from other states.

Those same-sex couples from other states who married in Massachusetts would return to their own states and demand that those states recognize their Massachusetts same-sex marriages. Again, the experience of Vermont is instructive. In less than two years after the Vermont civil union law took effect, intermediate appellate courts in at least two other states had been forced to confront the divisive issue whether or to what extent to recognize same-sex civil unions registered in Vermont.

In *Burns v. Burns*, 560 S.E.2d 47(Ga. App. 2002), the Georgia Court of Appeals affirmed a trial court ruling that a divorced, noncustodial mother who had her children for visitation while she was cohabiting with her lesbian lover with whom she had registered a Vermont civil union was in contempt of court for violating an order which prohibited visitation with either parent if the parent was living with someone to whom they were not married or closely related. The court noted that a civil union is different than a marriage in Vermont, citing the statutory text and legislative history. The court also held that "even if Vermont had purported to legalize same-sex marriages, such would not be recognized in Georgia," *Id.* at 49, citing Georgia's statutory statement of the state's public policy "to recognize the union only of man and woman," *Id.* Citing the federal

Defense of Marriage Act, the court declared that "Georgia is not required to give full faith and credit to same-sex marriages of ther states." *Id.* Defining marriage was identified as a legislative function, whereas the judicial function was to "follow the clear language of the statute." *Id.*

In *Rosengarten v. Downes,* 802 A.2d 170 (Conn.App. 2002), the Appellate Court of Connecticut affirmed the dismissal for lack of subject matter jurisdiction of a petition for dissolution of a Vermont Civil Union. Glen Rosengarten and Peter Downes entered into a same-sex civil union in Vermont in December, 2000. The court confirmed that "this civil union is not a marriage recognized under [Connecticut law] because it was not entered into between a man and a woman. . . . Nor is it a marriage under our sister state of Vermont's definition of marriage . . . because it too limits the definition of marriage to those entered between 'one man and one woman.'" *Id.* at 175. The court found nothing in the text of the Connecticut statutes or court rules or legislative history or common law that would justify extending family relations or family matters jurisdiction of the Connecticut courts to dissolution of same-sex Vermont civil unions. The Full Faith and Credit Clause of the United States Constitution did not prevent Connecticut from applying its own law to decide the matter since the plaintiff was a resident of Connecticut, and nothing in Connecticut or federal law requires Connecticut to provide a forum for dissolving Vermont civil unions. *Id.* at 179. Thus, the court concluded that "a civil union is not a family relations matter and, therefore, the [trial] court was correct in determining that it had no subject matter jurisdiction to dissolve the civil union . . . ." *Id.* at 184.

The experience of Vermont clearly shows that advocates of Same-Sex Marriage intend to force all states to recognize same-sex marriage if Massachusetts legalizes the same. The exportation of Vermont civil unions is just a preview of the aggressive effort that will be made using Massachusetts to manipulate and coerce other states to recognize same-sex marriage despite their own strong public policies, if this court legalizes same-sex marriage.

D. The Threat of Forcing Other States to Recognize a Massachusetts Same-Sex Marriages Has Generated Substantial, Strong Anxiety and Opposition in Many Sister States And In Congress.

The threat of being forced to recognize same-sex marriage is not a speculative or trifling concern. The other states and Congress have reacted with unusual alacrity to the situation. In the past seven years, more than two-thirds of the American states have enacted legislation, constitutional amendments, and ballot initiatives to clarify that those states will *not* recognize same-sex marriages even if performed in a state where they are treated as marriages.[10] Thus, thirty-

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[10] Ala. Code § 30-1-19 (2002); Alaska Const. art. I, § 25; Ariz. Rev. Stat. Ann. § 25-101 (West 2000); Ark. Code Ann. § 9-11-107 (2002); Ark. Code Ann. § 9-11-109 (2002); Ark. Code Ann. § 9-11-208 (2002); Cal. Fam. Code § 308.5 (West 2002); Colo. Rev. Stat. § 14-2-104 (2002); Del. Code Ann. tit. 13, § 101 (2001); Fla Stat. Ann. § 741.212 (West 2000); Ga. Code 19-3-3.1 (2002); Haw. Rev. Stat. § 572-3 (1999); Haw. Const. art. I, § 23; Idaho Code § 32-209 (2002); 750 Ill. Comp. Stat. Ann. § 5/212 (West 2000); Ind. Code § 31-11- 1-1 (2002); Ia. St. 595.2 (2002); Kan. Stat. Ann. § 23-101 (1999); Ky. Rev. Stat. Ann. §§ 402.040, 404.045 (Michie 2002); La. Civ. C. art. 89 (West 2000), amended by 1999 La. Act of July 2, 1999, No. 890 § 1; Me. Rev. Stat.

five states have responded to the possibility of legalizing same-sex marriage with the clearest expression that such marriages violate their fundamental public policy, and they will not recognize those unions as marriages.

Even Congress has responded with the clearest expression of its concern in opposition to the tactic of *forcing* other states or jurisdictions to recognize same-sex marriage. The Defense of Marriage Act (DOMA) was introduced in both the U.S. Senate and House of Representatives in May, 1996. H.R. 3396; S. 1740. Its two provisions explicitly declare that for purposes of federal law "marriage" means only heterosexual unions, and that federal full faith and credit rules do not require any state to recognize same-sex marriage. In less than five months, it passed the House of Representatives by a vote of 342-67, the Senate by a vote of 85-14, and was signed by President Clinton.[11] The Defense of Marriage Act specifically prevents federal laws, programs and agencies from

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Ann. tit. 19-A, § 701 (West 2002); Mich. Comp. Laws Ann. § 551.1 (West 2000); Mich. Comp. Laws Ann. § 551.271 (West 2000); Minn. Stat. Ann. § 517.01; Miss. Code Ann. § 93-1-1; Mo. Rev. Stat. § 451.022 (West 2002); Mont. Code Ann. § 40-1-401 (2002); Neb. Const. art. I, § 29; Nev. Question 2 (approved Nov. 5, 2002); (N.C. Gen. Stat. § 51-1.2 (West 2000); N.D. Cent. Code § 14-03-01 (1960); 43 Okla. St. Ann. § 3.1 (West 2000); Pa. Consol. Stat.Ann. § 1704 (West 2000); S.C. Code Ann. § 20-1-15 (West 2000); S.D. Cod. Laws § 25-1-1 (1968); Tenn. Code Ann. § 36-3-113 (1955); Utah Code Ann. § 30-1-4 (1953); Va. Code § 20-45.2 (West 2000); Vt. Stat. tit. 15, § 1201 (2002); Wash. Rev. Code Ann. § 26.04.020 (West 2000); W.Va. Code § 48-2-603 (2002).

11 *See* Melissa Healy, *No Wedding Bell Blues for Gay Couples*, L.A.Times, Sept. 22, 1996, at A1.

being co-opted to force the Federal government to recognize same-sex marriages. It also explicitly protects the states against being forced by an interpretation of federal Full Faith and Credit rules to recognize same-sex marriage (while preserving the right of each state to recognize same-sex marriages if it so chooses).

There is grave and substantial concern in the sister states and in Congress that legalizing same-sex marriage in one state will then be used to force other states and federal programs to recognize same-sex marriage without the consent and over the opposition of the people of those states and of the United States as a whole.

E. Massachusetts Has An Interest In Avoiding a Constitutional Crisis That Would Result When Same-Sex Marriage Advocates Try to Force Other States to Recognize Same-Sex Marriages From Massachusetts

Many advocates of same-sex marriage argue that the Defense of Marriage Act is unconstitutional. Advocates of same-sex marriage argue that under the Full Faith and Credit Clause of the Constitution, art. IV, sec. 1, all states are obligated to give "full faith and credit" to public acts and records of sister states, and that includes marriages.

On the other side, opponents of same-sex marriage and supporters of the DOMA argue that the Supreme Court of the United States has never held that marriages must be given full faith and credit, but traditionally states have been permitted to decline to recognize marriages from other states that violate strong local public policy (including marriages that violate incest laws, polygamy

prohibitions, restrictions of child marriages, etc.).

The point is not *which* position will ultimately be proven correct. Rather, the point is that a *serious* constitutional confrontation involving Congress, which overwhelmingly passed the Defense of Marriage Act, and the American judiciary is inevitable if Massachusetts legalizes same-sex marriage. In the confrontation, the judiciary will be asked to force states to recognize same-sex marriage over their own objections, and over the emphatic opposition of Congress.

F. Legalizing Same-Sex Marriage Will Extend An Illusory Promise Leading to Confusion, Detriment and Distress Because Most Other Nations Will Not Recognize Same-Sex Marriage.

Only one nation in the world -- The Netherlands -- permits (or has ever permitted) same-sex marriage. Since 1989, the Scandinavian countries and a few other European nations have enacted laws that create another relationship in law known as same-sex "domestic partnership." Each of those nations, however, very deliberately chose *not* to extend the status of *marriage* of same-sex unions, but decided to create an altogether different legal relationship for same-sex unions.[12] Marriage in those countries remains exclusively heterosexual. Many of the economic incidents of marriage are extended to same-sex domestic partnerships in those countries. Some significant non-economic incidents of marriage, however, are not extended to domestic partnerships, including adoption and joint

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[12] Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 Fam. L. Q. 497 (Fall 1995); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U.L.Rev. 1.

custody rights. The point, of course, is that the idea that marriage is exclusively a heterosexual union is not limited to American or Anglo-American traditions. It appears to be a ubiquitous notion of human society.

Legalizing same-sex marriage will offer homosexual couples an illusory promise of the status of "marriage" for their relationships. That promise would be deceptive because most other nations would refuse to recognize such marriages. If the couple or either party to the same-sex marriage left Massachusetts, it is unlikely that he/she/they would be accorded the rights or status of marriage in many foreign nations. Parties to same-sex marriages would expect, but be denied rights based upon marital status in foreign nations, including property, succession, inheritance, insurance, employment benefits, pensions, etc.

In determining whether a marriage is valid, nations generally look either to the law of the place of celebration of the marriage, or the place of the parties' domicile or nationality. Generally, if the marriage is valid in that place (of celebration, domicile or nationality, depending on the legal regime followed), it will be recognized as valid in other nations. However, a fundamental and ubiquitous exception to these rules of international marriage recognition is that marriages that "are incompatible with the public policy" of a country will not be recognized in that country, even if the marriage is deemed valid under the law of the state where celebrated or by the law of the parties' nationality or domicile.[13]

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[13] *See* Lennart Palsson, *Marriage in Comparative Conflict of Laws: Substantive Conditions 3* (Martinus Nijhoff Publishers 1981); *see also* Lennart Palsson, *Chapter 16, Marriage and Divorce*, in Vol. III, Private International Law, International Encyclopedia of

There can be little doubt that same-sex marriage would be found incompatible with public policy in most of the nations of the world.[14] A large part of the world adheres to very traditional ideas about marriage and family life. Same-sex marriage is deeply and profoundly repugnant to the cultural, ethnic, and religious traditions and political philosophies prevailing in many nations.

This fact was not lost on the Scandinavian nations that enacted "Domestic Partnership" laws. Denmark's domestic partnership law (the first enacted in the world and the model for the two other domestic partnership laws) provides: "Provisions of international treaties shall not apply to registered partnership unless the other contracting parties agree to such application."[15] Moreover, the Danish Act explicitly limits eligibility to register a domestic partnership by providing that one of the parties must be of Danish nationality and have permanent residence in Denmark.[16] The reason for this severe restriction was explained by a lawyer from the Danish Ministry of Justice as an expectation of international refusal to recognize such relationships: "The reason is that a

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Comparative Law 59 (1978); *see generally* Eugene F. Scoles & Peter Hay, Conflict of Laws § 13.5 (2d ed. 1992); The Hague Convention on Celebration and Recognition of the Validity of Marriages, 16 Int'l Leg. Mtrls 18 (1976). (Article 14, however, provides that "[a] Contracting State may refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy ('ordre public')."")

[14]Wardle, 29 Fam. L. Q. at 497. *et seq*..

[15]The Danish Registered Partnership Act §4(4), (Act No. 372 of June 7, 1989).

[16]*Id.* at § 2.

registered partnership in all probability will not be recognized abroad."[17] In fact, other European nations have refused to recognize same-sex domestic partnerships. Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe*, 32 Creighton L. Rev. 121 (1996). Even today, supporters of same-sex marriage admit that other European nations are unlikely to recognize such unions. Nicholas J. Patterson, *The Repercussions in the European Union of the Netherlands' Same-Sex Marriage Law*, 2 Chi. J. Int'l. L. 301, 307 (2001) (expressing doubt that other European Union nations will recognize same-sex marriages performed under the new Dutch law).

II. Respect for the Judiciary As An Institution and For the Rule of Law Will Be Impaired By A Judicial Decision Legalizing Same-Sex Marriage

A decision by this Court to judicially legalize same-sex marriage would severely impair the confidence of the people in the integrity of the judicial system and in the rule of law. The experience of Vermont is instructive. In December, 1999, the Vermont Supreme Court ruled in *Baker v. State*, 744 A.2d 864 (1999), that the "common benefits" clause of the Vermont Constitution required the state to either legalize same-sex marriage or some equivalent legal status with comparable marital benefits. That decision was loudly praised by advocates and

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[17]Marrianne Hojgarrd Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. Fam. L. 289, 290 (1991-92).

supporters of same-sex marriage, whose enthusiastic comments dominated the media. Largely overlooked in all the celebration was the significant and growing cynicism about the judiciary in general, and the Vermont Supreme Court in particular, and growing public skepticism about the integrity of the rule of law and of legal processes.

The criticism for the *Baker* decision began with the two concurring justices of the Vermont Supreme Court. Justice Dooley accurately criticized the flawed legal analysis of Chief Justice Amistoy's majority opinion as "neither fair nor accurate," 744 A.2d at 894 n.1 (Dooley, J., concurring), "incredible," *id.* at 895 n.3, "minimalist," *id.*, as effectively "overruling a long series of precedents," *id.* at 893, as "contrary to our existing jursiprudence," *id.*, without "moorings," *id.* at 897, as reviving judicial "Lochnerism," *id.* at 896, as judicial legislation, *id*. at 897, and as "a serious blow" to the court's "neutral constitutional doctrine," *id.* at 895. He concluded:

> In the end, the approach the majority has developed relies too much on the identities and personal philosophies of the men and women who fill the chairs at the Supreme Court, too little on ascertainable standards that judges of different backgrounds and philosophies can apply equally, and very little, if any, on deference to the legislative branch.

Id. at 897.

On the other hand, Justice Johnson's concurrence chided the majority for failing to grant the remedy their own analysis required, for "abdicat[ing] this Court's constitutional duty to redress violation of constitutional rights." *Id*. at 898 (Johnson, J., concurring). "None of the cases cited by the majority support its mandate suspending the Court's judgment to allow the Legislature to provide a

remedy." *Id*. at 903. The touchstone of both concurring opinions was criticism of the majority for pursuing personal ideological or political preferences rather than following and applying the law.

Numerous commentators have agreed with that severe criticism. Professor Lino Graglia chided the Vermont court for judicial "legislating," and commented: "The *Baker* decision is supported not by an spirit or essence of Vermont law, but by nothing more than the judges personal view, in accord with current elite opinion, that the reasons for preferring marriage to homosexual partnerships in granting legal benefits are vestiges of a darker time." Lino A. Graglia, *Single-Sex "Marriage": The Role of the Courts*, 2001 B.Y.U.L.Rev. 1013, 1019. Professor (now Dean) Douglas W. Kmiec noted "the Vermont Supreme Court has misinterpreted its own state constitution. A clause intended to ensure equal justice is not a prescription to transform dissimilar classes of citizens into identical ones." Douglas W. Kmiec, *There Cannot Be a Same-Sex Marriage*, Chi. Tribune, Dec. 23, 1999 (1999 WL 31273446). "The court . . . repeat[s] the mistake of the *Dred Scott* opinion . . . ."*Id.* David Orgon Coolidge and William C. Duncan, of the Marriage Law Project at The Catholic University of America's Columbus Law School noted that Chief Justice Amestoy's majority opinion "was bewildering to advocates on both sides" and was seen as a "creative political response . . . ." David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 Vt. L. Rev. 61, 63, 64 (2000). They concluded: "The court in *Baker* has defied both the reality of marriage and the proper power of the legislature." *Id.* at 88. Professor Lynn D.

Wardle criticized the Vermont Supreme Court for its "double-standard" and for "the corruption of marriage and family relations mandated by the Vermont Supreme Court in *Baker*." Lynn D. Wardle, *Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law*, 11 Widener J. Pub. L. __ (Issue No. 2, in production for March 2003). A national family support organization awarded the Vermont Supreme Court its "Court Jester - In Contempt"" award "[f]or a decision so utterly without legal foundation that it shocks the conscience of the public and causes contempt for the judicial system." *FRC Announces Winners of 2000 Court Jester Awards*, PR Newswire, June 30, 2000, <http://www.findarticles.com/cf_o/m4PRN/2000_June_30/63056286/print.jhtml> .

III. The Supreme Court of the United States Has Repeatedly Protected and Vindicated Marriage As the Basic Social Unit of Our Society

For well over a century the Supreme Court has emphasized the favored status in law of marriage and importance to society of marriage. In *Reynolds v. United States*,[18] the Court declared: "Upon it [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." A decade later, in *Maynard v. Hill*,[19] Justice Field glorified the legal status of marriage when he noted that "[m]arriage, as creating the most important relation in life, [has] more

[18]98 U.S. 145, 165 (1878).

[19]125 U.S. 190, 205-6 (1888).

to do with the morals and civilization of a people than any other institution . . . ." In *Meyer v. Nebraska*,[20] the Court not only acknowledged that "without doubt" marriage was one of the liberties protected by the Fourteenth Amendment, but the court directly linked marriage with establishing a home and raising children. The linkage between marriage and procreation was emphasized in *Skinner v. Oklahoma*,[21] when the Court invalidated a criminal sterilization law, noting: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." In *Griswold v. Connecticut*,[22] the Court again emphasized the marriage-procreation-child-rearing link when it declared:

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is the coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

When the Court struck down a Virginia anti-miscegenation statute in *Loving v. Virginia*, it again linked marriage with creating and nurturing the next generations: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[23] Likewise, in *Lehr v. Robertson*, the Court upheld a New York law under which an unmarried father could lose his right to

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[20]262 U.S. 390, 393 (1923).

[21]316 U.S. 535, 541 (1942).

[22]381 U.S. 479, 486 (1965).

[23]388 U.S. 1, 12 (1967).

notice of and opportunity to object to adoption of a biological child because "'the absence of a legal tie with the mother may in [some] circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist.'"[24]

In *Califano v. Jobst*,[25] involving welfare regulations that gave preference to married persons, the Court declared: "The *favored treatment of marriages* . . . does not violate the principle of equality embodied in the Due Process Clause of the Fifth Amendment." In numerous other cases in recent years, the Court has reiterated and enhanced the fundamental importance and preferred status of marriage.[26] In *Michael H. v. Gerald D.*,[27] the Court upheld the use of marriage to create a practically-irrebuttable presumption of a husband's paternity of children born during the marriages.[28] The plurality emphatically declared that "it is *not unconstitutional for the State to give categorical preference*" to marriage.[29]

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[24] 463 U.S. 247, 260, n. 16 (1983).

[25] Califano v. Jobst, 434 U.S. 47, 58 (1977) (emphasis added) (holding that the government may not adoption requirements tht even indirectly (economically) "significantly interfere with the decision to enter into the marital relationship.")

[26] *See, e.g., Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977); *Paul v. Davis,* 424 U.S. 693, 713 (1976); *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639-40 (1974); *United States v. Kras,* 409 U.S. 434, 444, 446 (1973);

[27] 491 U.S. 110 (1989).

[28] *Id.* at 127.

[29] *Id.* at 129.

This court should continue to recognize and respect the critical importance of male-female marriage to society and to children by affirming the decision of Judge Connolly.

IV. The First Principle of Constitutional Democracy and Respect for The Legislative Role

The first principle of the American legal system and the primary principle of all political legitimacy articulated by Thomas Jefferson in the Declaration of Independence is that governments "derive their just powers from the consent of the governed."[30] This principle "lies at the foundation of the American republic."[31] Jefferson's first principle teaches us that efforts to significantly redefine marriage by circumventing the consent of the governed are unjust and illegitimate. In our constitutional republic, it is not for a "bevy of platonic

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[30]Declaration of Independence, ¶1, cl. 3 (1776).

[31] Merrill D. Peterson, *Thomas Jefferson, the Founders, and Constitutional Change*, in The American Founding: Essays on the Formation of the Constitution 276 (J. Jackson Barlow et. al. eds., 1988), cited in Thomas B. McAffee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 Wake Forest L. Rev. 747, 781 n. 136 (2001); Larry D. Kramer, *Foreword, The Supreme Court 2000 Term Foreword: We the Court*, 115 Harv. 4, 17 (2001) ("What was the nature of this fundamental law? First and foremost it rested on consent: consent of the governed."); *See also* Bruce Ackerman, We the People 3-33, * (1991); John Hart Ely, Democracy and Distrust 1-18, 203, * (1980); Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 14-20 (1962).

guardians" – academic or judicial – to decide what is best for the people.[32] The definition of marriage is precisely the kind of issue that Jefferson and the other Founders risked their lives and fortunes to secure for the people to decide by the democratic processes.

For millenia, it has been recognized that the definition and regulation of marriage is one of the primary responsibilities of legislatures. Aristotle said that establishing marriage regulations was the "first duty" of the legislator. Aristotle, *Politica*, in 10 THE WORKS OF ARISTOTLE 1334-35 (W. Ross ed. 1921).

Decisions of this court have long recognized the primacy of the legislature in setting marriage policy. In *Commonwealth v. Lane,*[33] Chief Justice Gray wrote, "What marriages between our own citizens shall be recognized as valid in this commonwealth is a subject within the power of the legislature to regulate."[34] The legislature, not the courts, has the authority to determine the requirements that two individuals must meet in order to be married in the State of Massachusetts. The legislature is empowered to decide what policies will be embodied in the State's marriage laws and to craft the language of such statutes in a manner that will manifest the desired policies. The role of the courts is not to assist the

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[32] "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs." Learned Hand, The Bill of Rights 73-74 (1958).

[33] 113 Mass. 458 (1873).

[34] *Id.* at 462-63.

legislature in the development of the State's policies, but to implement it by seeing that the laws is interpreted in a way that reflects the intention of the legislature. It is basic public policy of the Commonwealth to "strengthen and encourage[] family life."[35] The Court's duty is to interpret and apply faithfully the marriage statutes adopted by the legislature, and not "to judge the wisdom of legislation or to seek to rewrite the clear intention expressed by the statute.[36] If the statute is constitutional, the Court must defer to the legislature.[37] A statute that declares public policy must be followed by the court, even if the court disagrees with the policy. Even if the court feels that the statute is narrow or under-inclusive, it is not within the providence of the Court "to read into legislation rights not provided,"[38] nor may it judicially legislate when an "event or contingency" is not provided for in a statute.[39] Perhaps this principle is best explained in *Simon v. Schwachman*[40] where the Supreme Judicial Court declared, "We have no authority to reform statutory language so as to accomplish some unexpressed result which the court imagines would have been acceptable to the

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[35] *Capazzoli v. Holzwasser*, 490 N.E.2d 420, 422 (Mass. App. Ct. 2002).

[36] *Commonwealth v. Russ R.*, 744 N.E.2d 39 (Mass.2001)

[37] *Murphy v. Department of Correction*, 711 N.E.2d 149 (Mass. 1999).

[38] *Hagen v. Commonwealth*, 772 N.E.2d 32, 374 (Mass. 2002)

[39] *Ibid.*

[40] 18 N.E. 2d 1 (Mass. 1938)

proponents of the statute and to the Legislature."[41]

V. Conclusion

Advocates of same-sex marriage are determined to use the marriage law of Massachusetts to promote their own aim to compel all states to recognize same-sex marriage. Such a gambit can begin a terribly divisive constitutional crisis among the states. By declining the plaintiffs' demands that same-sex marriage be legalized such a result can be avoided.

The Constitution of the United States, which consolidated the separate states into a mutually beneficial interstate federation, was intended to achieve "a more perfect union" and to insure "domestic tranquility." Massachusetts is a good and responsible participant in the national community of states. To legalize same-sex marriage would mar that record and wreak havoc. It would not contribute to "domestic tranquility" or a "more perfect union" but would insure a bitter constitutional confrontation and divisive interstate conflict. To avoid such, is an undeniably compelling state interest.

Dated this _____ day of December, 2002.

MARK L. SHURTLEFF
Utah Attorney General

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BRENT A. BURNETT
Assistant Utah Attorney General

DON STENBERG
Nebraska Attorney General

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[41] *Ibid*, at 4

MARK BARNETT
South Dakota Attorney General

CERTIFICATE OF SERVICE

I, Brent A. Burnett, certify that on this 19th day of December, 2002, I caused two copies of this Brief of State Amici Curiae to be mailed, by first-class mail, postage prepaid, to: counsel for the appellants, Mary L. Bonauto, Gay & Lesbian Advocates & Defenders, 294 Washington St., Suite 301, Boston, MA 02108-4608, and counsel for the appellees, Judith S. Yogman, Assistant Attorney General, One Ashburton Place, Room 2019, Boston, MA 02108-1698